Supreme Court, U.S.
FILED
941179 JAN 3 1995
OFFICE OF THE CLERK

NO._____

******

IN THE

Supreme Court of the United States

OCTOBER TERM 1994

******

JOHN C. BOWLES,
Petitioner
v.
HULETT H, ASKEW, DIRECTOR OF ADMISSIONS,
OFFICE OF BAR ADMISSIONS,
and the SUPREME COURT OF GEORGIA,
and the STATE OF GEORGIA
Respondents

******

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

******

PETITION FOR WRIT OF CERTIORARI

******

ARNOLD B. SIDMAN
135 GROSVENOR PL NW
ATLANTA, GEORGIA 30328
(404) 847-0061
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEE AN UNSUCCESSFUL BAR EXAMINATION APPLICANT SOME LIMITED RIGHT TO INSPECTION OF GRADED ANSWERS?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW I
TABLE OF CONTENTS II
TABLE OF AUTHORITIES III
REFERENCE TO OPINION BELOW 1
GROUNDS FOR JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF CASE 2
REASONS FOR GRANTING THE WRIT 4
CONCLUSION 9
APPENDIX A-Opinion of the Supreme Court of Georgia 1a
APPENDIX B-Opinion of the Superior Court of Fulton County 4a
APPENDIX C-Superior Court's Order Denying Plaintiff's Motion to Amend Judgment 7a

TABLE OF AUTHORITIES

CASES

PAGE

Schware v. Board of Bar Examiner's
353 U.S. 232 (1957) 2,7
Tyler v. Vickery 517 F 2d 355 (1976) 4
Singleton v. Louisiana Board of
Examiners 504 F. Supp. 1092 (1976) 5
Briggs v. Louisiana State Bar Association,
Supreme Court of Louisiana #46331, (1962) 5
Brewer v. Wegmann 691 F.2d 216 (1982) 5
Whitfield v. Illinois Board of Bar Examiners
504 F.2d 474 (1974) 5
Application of Peterson 459 P. 2d 703 (1969) 6
Mathews v. Eldridge 424 U.S.319 (1976) 7
Armstrong v. Manzo 380 U.S. 545 (1965) 8
Joint Anti-Facist Comm. v. McGrath
341 U.S. 123 (1951) 8

UNITED STATES CONSTITUTION AND STATUTES

Section 1. of the Fourteenth Amendment to the
Constitution of the United States of America 2
28 USC 1257 (a) 1

REFERENCE TO OPINION BELOW

JOHN C. BOWLES V. HULETT H. ASKEW, DIRECTOR, ET AL.
264 GA. 520, 448 S.E. 2d 291 (1994)

GROUNDS FOR JURISDICTION

a.) Judgement of the Supreme Court of Georgia entered September 21,1994.

b.) Motion for reconsideration denied October 6,1994.

c.) Pursuant to 28 USC Sec. 1257 (a), this Court has jurisdiction to review. Having deprived him a license to practice law, Petitioner contends that Georgia has failed to afford him Due Process of law by denying his request for an adversarial inspection of graded bar examination answers. Section 13 of the Supreme Court of Georgia's rules governing Admission to the Practice of Law provides as follows:

Review of Examination Answers

Neither the Board of Bar Examiners nor any member thereof shall conduct post examination interviews with applicants nor shall the Board or any member thereof regrade any applicant's answers to examination questions after the general release of grades nor shall any applicant's answers be retained beyond the commencement date of the succeeding examination. The Director of Bar Admissions may conduct post examination interviews with applicants but he shall not review examination questions or answers with an applicant, nor shall he allow inspection of either questions or answers following the giving of an examination, but an applicant may make duplicate copies of his or her answers at the time of taking the examination and

may retain copies of questions with the exception of questions and answers on those portions of any examination prepared for the Board by or under the supervision of the National Conference of Bar Examiners.

Notwithstanding Petitioner's visceral reaction to the contrary, the Georgia Supreme Court has now held that strict application of this rule does not constitute a denial of Due Process!

In Schware v. Board of Bar Examiners 353 U.S. 232 (1957) this Court held that Due Process protections extend to bar applicants. But it is apparent the Court has not made it clear that a right to inspection is necessarily embodied within the scope of such protections. In light of the Georgia decision this important question of Federal law should now be specifically addressed by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1. of the Fourteenth Amendment to the Constitution of the United States of America ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF CASE

The Petitioner, a Lawyer and Certified Public Accountant licensed in Texas and Oklahoma respectively, was notified that he had failed to pass the July 1993 Georgia Bar Examination for attorneys. The embarrassingly low reported score of 61 seemed questionable considering Petitioner's scholastic and professional records.

Tampering was suspected because at least two Georgia attorneys had ample motive to exert improper influence; and the opportunity to manipulate examination results without fear of

detection by applicants is tantalizingly available under Georgia's Rules. Petitioner was at the relevant time assisting a friend in a nasty will contest; both opposing attorneys knew Petitioner had taken the July Bar Examination and were desperately seeking to deny Petitioner's client the benefit of his professional assistance. As an out-of-state Attorney, Petitioner's request to represent his client under Section 4.4 of the Probate Court Rules was initially granted over the formal objection of one of the opposing attorneys. After the results of the July Bar Exam were posted, the objection was renewed citing inter alia Petitioner's failure to pass. This time the Probate Court agreed and rescinded its favorable ruling. As a result, Petitioner's client was forced to engage substitute counsel.

Initially assistance in verifying the absence of error or tampering was sought from the Director of Bar Admissions, who refused citing Rule 13. Then, in Fulton County Superior Court, although Petitioner argued strenuously that a representative of his own choosing must be afforded the opportunity to verify the reported grades were properly attributable to his own work and there had been no tampering, the Director's right to deny inspection was upheld. And with callous disregard for Petitioner's rights, the Court refused to enjoin destruction of Petitioner's examination papers pending appeal, thus officially eliminating any possibility that Petitioner could ever prove tampering [Appendices B and C], Georgia's highest court affirmed [Appendix A].

In the Superior Court, Petitioner raised the Federal Due Process question in paragraph 10. of his Complaint ". . . an inspection procedure would be the minimum required by the Due Process clauses of both the Georgia and Federal Constitutions" [R pg 6]. In the Supreme Court of Georgia, Petitioner raised the Question in both his Enumeration of Errors [filed 4/13/94 pg 1] "Such denial constituted a failure to afford Appellant due process of law protections guaranteed by both the Geor

gia and United States Constitutions" and his Brief [filed 4/5/94 pg 1] "(1) Does Part B, Section 13 of the Rules . . . preclude inspection of a failed applicant's answers by a representative of his choosing? (2) If so, does that Section deny procedural due process protections guaranteed by the Georgia and United States Constitutions?" That Court specifically alluded to Petitioner's Due Process claim in its opinion " . . . that such an inspection procedure would be the minimum required by the Due Process clauses of both the Georgia and Federal Constitutions." [Appendix A].

REASONS FOR GRANTING THE WRIT

The Supreme Court of Georgia rested its decision on Tyler v. Vickery 517 F. 2d 355 (1976), a Georgia case involving a charge of racial discrimination in grading, where a demand for a supplemental hearing was at issue. Considering the intolerable burden a supplemental hearing system would impose, the Fifth Circuit held that for Due Process purposes, the unqualified right to reexamination was sufficient. Petitioner argued to no avail that Tyler does not provide convincing precedent for two reasons: 1. at issue in this case is a limited right to inspection which would impose little additional burden on the State, not a supplemental hearing. Ironically the Tyler appellants were actually allowed to inspect every single examination paper written by all applicants and were simply not able to carry their burden of proving discrimination, and 2. the unqualified right to reexamination is not a sufficient substitute for inspection.

If tampering is involved, an unqualified right to reexamination is practically meaningless: the Court's discussion of the unlikelihood of inadvertent error is irrelevant and simply begs the question. Under Georgia's Rules, the person or persons responsible could exclude petitioner from the practice of law, examination after examination, in complete secrecy and with absolute impunity. In fact Petitioner's suspicions are now stron

ger than ever having taken both regular examinations given in 1994. Petitioner was advised he had passed the multistate exam, even improving his grade by 5 points on the second attempt, but in each instance had fallen teasingly short overall by a single point. Presently Petitioner has no intention of subjecting himself to the ordeal again unless Rule 13 is changed.

Added to the confusion regarding the scope of Tyler which did not consider the inspection issue, are the conflicting decisions of Courts in three Louisiana cases, an Illinois case and an Alaska case which did. In Singleton v. Louisiana Board of Bar Examiners 504 F. Supp. 1092 (1976), relying heavily on Tyler and also citing Briggs v. Louisiana State Bar Association, Supreme Court of Louisiana #46331, (1962), a three-judge Federal Court did not find the Louisiana practice of destroying examination papers immediately after grading fatally repugnant to Due Process principles. The Fifth Circuit in Brewer v. Wegmann 691 F. 2d 216 (1982) citing Singleton, also declined to hold Louisiana's procedure unconstitutional.

In Whitfield v. Illinois Board of Bar Examiners 504 F. 2d 474 (1974) where the plaintiff had been given five opportunities to write a bar examination, the Seventh Circuit conceded "We may assume that the due process clause requires the state to employ fair procedures in processing applications for admission to the Bar and, therefore, that an applicant who has failed the bar examination is entitled to some procedural protections. Nevertheless, we do not believe that, in the context of this case, the procedures requested by the plaintiff are required by the Constitution." The Court further noted "In addition, at least one of the examiners personally discussed with Plaintiff his general performance in the exam and even graded sample answers which Plaintiff wrote ... Furthermore, merely seeing his examination or comparing it with others would not allow plaintiff to expose errors or discern his abilities. These procedural rights would be virtually meaningless unless plaintiff also

was able to confront the bar examiners and obtain from them explanations of their grades. Requiring an explanation for each of these [failing] applicants would place an intolerable burden upon the bar examiners. It also would place at an unfair disadvantage those applicants who were taking the exam for the first time."

The Supreme Court of Alaska in Application of Peterson, 459 P. 2d 703 (1969), held that inspection was an indispensable requirement of a procedurally fair hearing. The Court chose not to rest its decision directly on the Federal Due Process Clause mandate: although its rationale would have applied equally well to such an analysis. The Court noted: "The basic unfairness inherent in the procedure employed below receives illumination from the position taken by the Board of Governors of the Alaska Bar Association before this court. Here the board insists that as a precondition to the exercise of our review jurisdiction appellant must demonstrate that his failing grade was a product of fraud, imposition, or other serious grounds or circumstances". Respondent argued before the Georgia Supreme Court that Peterson must be considered in light of the small number of Bar Applicants in the State of Alaska: i.e. inspection did not cause an "intolerable burden" as would be in the case in Georgia. Respondent's argument is unconvincing. Although no comprehensive survey has been undertaken, a review of pertinent cases reveals that many populous States, including California and New York, guarantee inspection rights.

Notwithstanding the decisions in all three Louisiana cases, Petitioner strongly contends that Louisiana's immediate destruction procedures, which preclude any possibility of adversarial inspection under any circumstances are inconsistent with Due Process principles. As in this case, Petitioner asserts that reliance on Tyler in these cases was misplaced.

The Seventh Circuit Court in the Illinois case recognized

the applicability of the due process requirements. It can be convincingly argued that the result in that case would have been different had the court been confronted with the facts of this case and the carefully limited demand for inspection, specifically foregoing any right to follow-up involvement of bar examiners.

And finally, the Alaska Supreme Court's rationale provides compelling support for Petitioner's position.

This court set forth the relevant Due Process considerations in Mathews v. Eldridge 424 U.S. 319 (1976):

1. the private interest affected;

2. the risk of erroneous deprivation and the probable value, if any, of additional or substitute safeguards;

3. the government's interests including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The private interest is clearly a substantial one. In Schware v. Board of Bar Examiners, supra, this Court held that States could not exclude a person from the practice of law in a manner that contravenes the Due Process Clause of the Fourteenth Amendment. There is a serious risk of erroneous deprivation since under the Georgia Rules unsuccessful applicants are afforded no adversarial rights to inspection nor any opportunity to be heard whatsoever. The right to adversarial inspection would be of unquestionable value in uncovering any tampering and its availability alone would have a salutary effect. It would send a clear message to anyone within the system who might otherwise be tempted to improperly manipulate examination results; no one could operate with the smug assurance

that detection and exposure is impossible since by law an applicant is absolutely without rights! Only minimal additional administrative burdens would be entailed; all the work would be done by the applicant's representative. And finally, interjecting a representative as the inspector would even avoid the competitive advantage objection noted in Whitfield, supra.

The fundamental requirement of Due Process was articulated by this Court in Armstrong v. Manzo 380 U.S. 545 (1965) "The opportunity to be heard at a meaningful time and in a meaningful manner". And the indispensability of the adversarial element of Due Process protection was eloquently set forth in Joint Anti-Facist Comm. v. McGrath 341 U.S. 123 (1951) "Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling so important to a popular government, that justice has been done".

Section 13 of Georgia's Rules, which precludes inspection absolutely, provides no opportunity for the unsuccessful applicant to be heard at all and like the immediate destruction procedures in Louisiana cannot be supported in light of Fourteenth Amendment Due Process Guarantees! Petitioner begs this Court to make it clear that Due Process requires the curtain of secrecy to be parted at least enough to allow the penetrating light of adversarial inspection to illuminate the scene sufficiently to insure that no State representatives succumb to otherwise alluring temptations to manipulate Bar Examination results.

The organized Bar is an integral part of the system for administration of justice in this country. The procedures for admission to the Bar should reflect the provision of fundamental fairness which undergirds that system. Star Chamber bar ad

mission procedures are the antithesis of fundamental fairness and should not be tolerated!

CONCLUSION

Petitioner asks the Court to issue a Writ of Certiorari to the Supreme Court of Georgia and review the issue presented in this case.

Respectfully submitted,

ARNOLD B. SIDMAN
135 GROSVENOR PL NW
ATLANTA GEORGIA 30328
(404) 847-0061
Attorney for Petitioner

APPENDIX A

In the Supreme Court of Georgia

Decided: Sep 21, 1994

S94A0984. BOWLES V. ASKEW, ET AL.

Motion for Reconsideration Denied Oct. 6, 1994

SEARS-COLLINS, Justice.

Appellant John C. Bowles took but did not pass the July 1993 attorneys' examination for admission to the practice of law in Georgia. See Rules Governing Admission to the Practice of Law ["Rules"], Part C Section1. Bowles then petitioned the superior court for a writ of mandamus directing the Georgia Office of Bar Admissions to allow Bowles' representative to inspect the answers which were matched with his name as well as the answers of five other applicants who took the same examination, in order to determine whether Bowles actually submitted the answers which were matched to his name. Bowles contended that "such an inspection procedure would be the minimum required by the Due Process clauses of both the Georgia and Federal Constitutions." Bowles also sought a temporary restraining order to prevent the destruction of his answers pursuant to Part B Section of he Rules, which provides that an " applicant's answers [shall not] be retained beyond the commencement date of the succeeding examination."

After a hearing, the trial court denied Bowles' request for a temporary restraining order and dismissed the complaint for mandamus. The trial court found that the Board of Bar Examiners has the authority to deny Bowles access to the requested information under the Rules, and that "[i]n light of [Bowles'] unlimited opportunity to retake the bar examination, there is

no evidence of irreparable injury." On appeal, Bowles reasserts his contention that he has been unconstitutionally deprived of due process of law. For the following reasons, we affirm the trial court.

Part B Section of the Rules provides that "[t]he Director of Bar Admissions...shall not...allow inspection of either questions or answers following the giving of an examination." The due process ramifications of the lack of a procedure in Georgia's Rules for the review of a failed examination were considered in Tyler v. Vickery, 517 F2d (5th Cir. 1975).

That court balanced the applicant's "interest in avoiding the loss which lack of the procedure inflicts upon him against the interests which the government seeks to advance by denying it." Id. at 1104. The Tyler court recognized that "scores of applicants fail the Georgia bar examination each time it is given," id. at 1105, and that requiring review of every failing grade would be "an intolerable burden upon the bar examiners," id. (citation omitted). The court found that since there is no limit on the number of times an applicant may take the bar examination, "the 'liberty interest' a failing examinee has at stake [is] minor, . . . [while] the interests which the state seeks to advance by substituting reexamination for hearing for a hearing [are] substantial."

We find that even if there is a chance that Bowles' failing grade was based on examination answers other than his own, the likelihood that the same error would be repeated is minuscule, especially in light of the procedures and precautions in effect when the examination is administered and graded, see Parts B and C of the Rules[1]. As there remains no limit on the number of times an applicant may take the bar examination, we find that any liberty interest threatened by the trial court's dismissal of Bowles' complaint is outweighed by the state's interests advanced by the Rules and recognized in Tyler.

Therefore, we hold that the trial court did not err in dismissing Bowles' complaint.

Judgment affirmed. All the Justices concur.

---

[1] Bowles has not alleged any impropriety in the procedure for the administration and grading of the examination; rather, his only allegation consists of speculation that his examination booklet may have been confused with someone else's.

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

JOHN C. BOWLES, Plaintiff	)	
VS.	)	CIVIL ACTION
	)	FILE NO:
HULETT H. ASKEW, Director of Admissions; OFFICE OF BAR ADMISSIONS; THE SUPREME COURT OF GEORGIA; and THE STATE OF GEORGIA,	)	E-23113
Defendants	)	

ORDER DENYING TEMPORARY RESTRAINING ORDER AND DISMISSING CASE

This matter came on for a hearing on plaintiff's emergency motion for temporary injunction on Thursday, February 10, 1994. Defendants had previously filed a motion to dismiss on January 5,1994. Based upon a review of the parties' briefs and oral arguments, the Court finds as follows:

1.

Under the Georgia Constitution, the Judicial branch of government, and specifically the Supreme Court, has exclusive authority to regulate the legal profession and membership in the State Bar. Ga Const. Art. 1, §2, ¶3. In Re Oliver , 261 Ga. 850 (1992).

2.

Based upon the rules promulgated by the Georgia supreme Court, pursuant to its authority to regulate the legal profession and admission thereto, the Board of Bar Examiners has the authority to establish procedures to administer and grade the bar examination.

3.

The Board of Bar Examiners has the Authority under its rules to deny plaintiff or plaintiff's representative access to an inspection of the Board's records, including but not limited to, plaintiff's answers to the bar examination. (Rules Governing Admission to the Practice of Law, Part B, Section 13.)

4.

In light of plaintiff's unlimited opportunity to retake the bar examination, there is no evidence of irreparable injury.

5.

Plaintiff's complaint does not state a basis for a course of action against the defendants.

Based upon these findings, the Court ORDERS that plaintiff's complaint be DISMISSED.

SO ORDERED, this 14th day of February, 1994.

/s/ DON A. LANGHAM, Judge
Superior Court of Fulton County

Copies to :

John C. Bowles
4934 Gaskin Walk
Marietta, GA 30068

Julia B. Anderson
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334

APPENDIX C

IN THE SUPERIOR COURT OF FULTON

STATE OF GEORGIA

JOHN C. BOWLES, Plaintiff	)	CIVIL ACTION FILE No. E-23113
vs.	)	
HULETT H. ASKEW, Director of Admissions, et al.,	)	
Defendants	)	

ORDER DENYING PLAINTIFF'S MOTION TO AMEND JUDGMENT

Plaintiff filed an action against the "Director of Admissions, Office of Bar Admissions, and the Supreme Court of Georgia, and the State of Georgia." Plaintiff sought a temporary restraining order to seek independent examination of his bar examination documents and to require the Office of Bar Admissions to retain those documents.

A hearing was conducted. At the hearing, the defendants moved to dismiss the action. After hearing arguments, this Court denied the temporary restraining order and granted defendants' motion to dismiss.

Plaintiff now moves to amend the judgment to prohibit the defendants from destroying his bar examination answers.

That issue was considered by the Court at the hearing on the temporary restraining order. It will not be considered again.

The Plaintiff's motion to amend judgment is DENIED.

SO ORDERED, this 17th day of February, 1994.

/s/ DON A. LANGHAM, Judge
Superior Court of Fulton County

Copies to:

John C. Bowles
4934 Gaskin Walk
Marietta, GA 30068

Julia Anderson
State Law Department
132 State Judicial Building
Atlanta, GA 30334-1300